WILLIAM JACKS & CO. (M) SDN. BHD.

v.

CHEMQUIP (M) SDN. BHD. & ANOR.

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
HARUN HASHIM SCJ
GUNN CHIT TUAN SCJ
[SC CIVIL APPEAL NO. 02-447-90]
3 MAY 1991

CIVIL PROCEDURE: *Notice of motion to admit fresh evidence on appeal - Inherent jurisdiction of Court - Challenge of solicitor's authority to act - Oral preliminary objection - Substantive application - Whether sufficient or admitted evidence - Struck off or stayed - Courts of Judicature Act 1964, s. 69(1).*

As a result of the appellant W's claim against the respondents, the Court on 30 May 1990, granted W's application for an interlocutory injunction against the respondents. During the application of the respondents' solicitors to set aside this injunction, the respondents made an oral preliminary objection on the question of the authority of W's solicitors, Messrs. PC & K, to act for W.

The learned trial Judge held that the Court may entertain a challenge as to the authority of solicitors and that it may refuse to proceed further if the Court can conclude, on sufficient or admitted evidence in relation to authority to act before the Court, that there is no proper action before the Court. Based on the evidence before him, his Lordship upheld the respondents' objections and ordered that W's action be struck off.

W appealed and also filed the present notice of motion under s. 69(1) of the Courts of Judicature Act 1964 (the Act) and r. 51 of the Rules of the Supreme Court 1980 for the admission, by way of further affidavit evidence, of W's board resolution dated 18 May 1990, (the said resolution) which contained the relevant authority of the solicitors.

W's Counsel C contended that the judgment of the trial Judge was erroneous in law because the learned Judge did not have sufficient or no evidence at all before him to decide on the question of the authority of Messrs. PC & K.; the trial Judge did not have the benefit of W's memorandum and articles nor the said resolution. Further C contended that the letters written by the respondents to W were not tendered to the Court as evidence. C also submitted that a formal application was necessary for a challenge of a solicitor's authority and that the trial Judge should have stayed the action rather than dismiss it.

Counsel for respondents argued that since W did not produce the said resolution in the lower Court, although the respondents had asked Messrs. PC & K for their authority to act, W's application should not be allowed.

Held:

[1] Where there has not been a trial or hearing on the merits, the conditions laid down in *Ladd v. Marshall* on the issue of admission of fresh evidence on appeal does not apply.

[2] Under s. 69(1) of the Act, the Supreme Court has a full and general discretion whether to admit fresh evidence on appeal. An important factor which has to be taken into account in exercising the appellate Court's discretion is the reason why the evidence was not adduced in the Court below. In this case, the Court was satisfied as to the reason why the evidence was deliberately not adduced in the lower Court.

[3] The business of the Courts could not be carried out if one were not entitled to assume the authority of the solicitor unless and until that authority has been disputed and shown not to exist in a proper form of proceeding, namely a substantive application on the part of the parties concerned to stay the proceedings on the ground of want of authority.

[4] A challenge as to the authority of solicitors may be made at any time and the Court in its inherent jurisdiction may entertain the challenge made orally and may order the action to be struck off if there was sufficient or admitted evidence that there is no action properly before it. However, when there is no such evidence, the Court should only stay the proceedings and determine the issue of want of authority on the application of a party by motion or summons.

[5] In this case, Counsel for the respondents had merely stated from the Bar that they had written to W's solicitors on 26 September 1990, and 30 October 1990, but these letters were not produced in evidence to the Court. There was no evidence at all before the lower Court of any document regarding authority to act.

[W's appeal stayed; case remitted to High Court for hearing respondents' challenge on a substantive application.]

Cases referred to:

Chin Kok Kwong Construction Sdn. Bhd. v. Sunrise Towers Sdn. Bhd. [1968] 2 MLJ 41
Fresh Food & Refrigerating Co. Ltd. v. Sime & Co. [1935] MLJ 196
John Shaw & Sons (Salford) Ltd. v. Peter Shaw & John Shaw [1935] 2 KB 113
Khoo Leong Kee v. L.Y. Swee Co. [1968] 2 MLJ 104
Ladd v. Marshall [1954] 3 All ER 745/748 1 [1489] WLR
Richmond v. Branson & Son [1914] 1 Ch 968
Russian Commercial and Industrial Bank v. Comptoir D'escompte De Mulhouse [1923] 2 KB 630 655; [1925] AC 112
Simmons v. Liberal Opinion Ltd [1911] 1 KB 966

Legislation referred to:

Court of Judicature Act 1964, s. 69(1)
Rules of the Supreme Court 1980, r. 51

Other source referred to:

Halsbury's Laws of England, 4th Edn., Vol. 37, para. 693, Vol. 44

For the appellant - Cecil Abraham (Karen Goonting with him); M/s. Paul Chong & Kraal
For the respondents - Shamsul Bahrain bin Ibrahim (K. Balaguru with him); M/s. A.K. Lee & Co.

JUDGMENT

Gunn Chit Tuan SCJ:

After filing its record of appeal on 23 November 1990, William Jacks & Co. (M) Sdn. Bhd. (the appellant) filed a notice of motion dated 8 January 1991, to move the Court pursuant to s. 69(1) of the Courts of Judicature Act 1964, read with r. 51 of the Rules of the Supreme Court 1980, for an order that:

(i) The appellant, as applicant, be granted leave to insert a copy of the sealed order dated 9 October 1990, into the record of appeal filed on 23 November 1990; and

(ii) the appellant, as applicant, be granted leave to admit by affidavit the appellant's board resolution dated 18 May 1990, as further evidence.

The appellant had on 29 May 1990, instituted an action through M/s. Paul Chong & Kraal against Chemquip (M) Sdn. Bhd. and one Amy Yew Sze Kiat @ Eew Sze Chieh (f) (the respondents) for *inter alia* breach of a service contract and of fiduciary duty owed to the appellant. The relief claimed was substantially to restrain the respondents from exploiting confidential information with regard to certain equipment supply contracts for their own benefit and gain. On 30 May 1990, the appellant obtained an interlocutory injunction to restrain the respondents from dealing in those disputed equipments. At the hearing of an application on 4 October 1990, to set aside the interlocutory injunction, the respondents' solicitors orally raised a preliminary objection and questioned the authority of M/s. Paul Chong & Kraal to act for the appellant. After hearing submissions by Counsel, Wan Adnan J upheld the respondents' objection and ordered that the appellant's action be struck off with costs.

Before us, Mr. Cecil Abraham, senior Counsel for the appellant, referred to the judgment of the learned trial Judge in which His Lordship expressed the view that a challenge to authority of the solicitors can be made at any time and that:

> the Court may in its inherent jurisdiction entertain the challenge made orally at any stage of the proceedings and may refuse to proceed further with the proceedings if the Court can come to a conclusion on sufficient or admitted evidence that there is no action properly before it.

It was the contention of Counsel that if the learned Judge had considered carefully the three cases referred to by him in his judgment, namely *Khoo Leong Kee v. L.Y. Swee Co.* [1968] 2 MLJ 104; *Chin Kok Kwong Construction Sdn. Bhd. v. Sunrise Towers Sdn. Bhd.* [1986] 2 MLJ 41; and *Simmons v. Liberal Opinion Ltd.* [1911] 1 KB 966, he would have seen that there was basic evidence before the Court in those cases that the suits were instituted without authority and should be dismissed with costs. It was the submission of appellant's Counsel that those cases were distinguishable on their facts because, unlike those cases, in the present case there was no evidence at all of any document regarding authority to act before the Court.

Mr. Abraham pointed out that the learned Judge did refer to the following passage in the judgment of Warrington J in *Richmond v. Branson & Son* [1914] 1 Ch 968:

> But the real question is the authority of the solicitor. Is that a question which can be raised as a relevant issue in the action and at the trial? No authority has been cited in support of the affirmative of such a proposition, and, in my opinion, it is impossible, according to the ordinary practice and procedure of the Court, to justify that proposition. The business of this Court could not be carried on if one were not entitled to assume the authority of the solicitor unless and until that authority has been disputed and shown not to exist in the proper form of proceeding, namely a substantive application on the part of the parties concerned to stay the proceedings on the ground of want of authority,

and contended that that case clearly supported the appellant's position that a substantive application on the part of the parties concerned to stay proceedings on the ground of want of authority is required.

The learned Judge had also referred to the following passage in the judgment of Slesser LJ in *John Shaw & Sons (Salford) Ltd. v. Peter Shaw & John Shaw* [1935] 2 KB 113, 131, 145, 147:

> In my view, the reasons for the conclusion of the House of Lords and of Atkin LJ in the *Russian Bank* case and of Warrington J in *Richmond v. Branson* were that in those cases questions of fact on which it needed to be decided whether there was or was not authority had to be considered, and the Court declined to go into such matters of evidence except upon

> a substantive motion. But the rights of the Court in its inherent jurisdiction to stay actions which would be an abuse of its process if they are not properly upon the record, either because the plaintiff was not existent at the time of the issue of the writ or because they are satisfied on the facts that he had not authorized the proceedings, has so far been undoubted, and this, altogether apart from the desire of either party, if the facts are before the Court. Where the Court may properly come to a conclusion on sufficient or admitted evidence that there is no action properly before it, it may well think it right to act in accordance with that inherent jurisdiction, to refuse to proceed, and the difference which has been sought to be found between the case where no retainer could be given at all, and the case where what is still in dispute is whether in fact there was or was not authority to give one is not a difference in principle, but a difference of expediency, depending upon whether a Court is or is not so informed of the facts that it does or does not think it right to come to a conclusion on the matter as a question of law,

but Counsel pointed out that Lord Justice Slesser was the dissenting Judge who gave a contrary opinion in the U.K. Court of Appeal, and contended that that case again supported the appellant's position in that a substantive motion is required and that the Court can only come to the conclusion of lack of authority on sufficient or admitted evidence but that in this case there was no evidence whatsoever before the Court.

It was therefore the contention of Counsel for the appellant that the judgment of the lower Court was erroneous in law because the learned Judge did not have sufficient or no evidence at all before him to decide on this issue. He did not have the benefit of the memorandum and articles of the appellant or its board resolution and therefore the judgment was erroneous. Counsel also pointed out that a perusal of the notes of evidence (p. 50 of the appeal records) shows that none of the letters written by the respondents were tendered as evidence before the Court and that therefore there was neither admitted or sufficient evidence for the learned trial Judge to come to any conclusion.

On the necessity of a formal application to the Court for a challenge of the appellant's solicitors' authority, Counsel then referred to the following paragraph in Vol. 44 of *Halsbury's Laws of England* (4th Edn.):

> 115. Effect of acting without authority. The fact that a solicitor was not authorised to institute proceedings is not a defence to those proceedings and, although in special circumstances the correct course may be for the Court to strike out proceedings instituted without authority, the proper method of raising the question of want of authority is usually by an application to stay the proceedings. Accordingly, if a solicitor takes, defends or continues proceedings without the authority of the litigant whom he purports to represent, those proceedings will be summarily stayed if the proceedings are instituted without authority, or the defence will be struck out if they are defended without authority, on the application of a party by motion or summons.

He then submitted that the learned Judge, upon discovery of the purported lack of authority of the appellant's solicitors to bring the suit, should have stayed the action on terms rather than dismissing it in order to enable the appellant to remedy the situation.

Mr. Balaguru, one of the Counsel for the respondents referred us to para. 693 in Vol. 37 of *Halsbury's Laws of England* (4th Edn.) concerning appeals and pointed out that:

> before further evidence will be admitted, (1) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; (2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and (3) the evidence must be apparently credible although it need not be incontrovertible.

(see *Ladd v. Marshall* [1954] 3 All ER 745; [1954] 1 WLR 1489, per Denning LJ). Counsel stated that they had asked the appellant's solicitors for their authority to act before the hearing in the High Court but the appellant did not produce the purported board resolution which was available at all material times and it was therefore neither fresh nor further evidence. It was his contention that as the appellant had the opportunity to produce that board resolution in the Court below, its notice of motion should be disallowed.

Mr. Shamsul Bahrain, the other Counsel for the respondents, referred us to *Russian Commercial and Industrial Bank v. Comptoir D'escompte De Mulhouse* [1923] 2 KB 630, 655, in which His Lordship Scrutton LJ had stated *obiter* in the U.K. Court of Appeal that an objection regarding authority to act could only be done:

> in a particular way, on motion to strike out, is technical in the extreme, and in view of the decision of the House of Lords I think erroneous.

It was his contention that the stand taken by the appellant in this case was also technical and should not be entertained by the Court.

Firstly in so far as the said notice of motion was concerned, we considered that the conditions laid down in *Ladd v. Marshall* [1954] 3 AER 745/[1954] 1 WLR 1489 regarding the strict approach for fresh evidence to be admitted on appeal only applies where there has been a trial or hearing on the merits. But where there has not been a trial or hearing on the merits as in this case, the *Ladd v. Marshall* [1954] 3 AER 745/[1954] 1 WLR 1489 at 1491, conditions do not apply. But this Court has in any case a full and general discretion whether to admit fresh evidence as laid down by s. 69(1) of the Court of Judicature Act 1964, which reads as follows:

> 69. Hearing of appeals.
>
> (1) Appeal to the Supreme Court shall be by way of re-hearing, and in relation to such appeals the Supreme Court shall have all the powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner.

In a case where there has been a trial, it is interesting to note that *Fresh Food & Refrigerating Co. Ltd v. Sime & Co.* [1935] MLJ 196 is an instance of a special case in which the Court of Appeal of the former Straits Settlements in Singapore has allowed admission on the hearing of an appeal of evidence which should have been available at the trial, pursuant to s. 23 of the repealed Courts Ordinance, which provides that the Court of Appeal shall have "full discretionary power to receive further evidence by affidavit". An important factor which has to be taken into account in exercising the appellate Court's discretion is the reason why the evidence was not adduced in the Court below. In this case, we were satisfied as to the reason why the evidence was deliberately not adduced in the Court below and we therefore made an order as prayed for in the said notice of motion.

Then after considering the submissions of Counsel regarding the challenge to the authority of the appellant's solicitors to act, we agreed with the observations of Warrington J in *Richmond v. Branson & Son* [1914] 1 Ch. 968, 974 that the business of the Courts could not be carried out if one were not entitled to assume the authority of the solicitor unless and until that authority has been disputed and shown not to exist in a proper form of proceeding, namely a substantive application on the part of the parties concerned to stay the proceedings on the ground of want of authority. We have perused the first three cases referred to by the learned Judge in his judgment and agreed with learned Counsel for the appellant that they are distinguishable because in those cases there was evidence before the Court to prove facts on which the Court may properly come to a conclusion on the admitted evidence that

there was no action properly before it. In such cases, we would agree with the learned Judge that the Court may in its inherent jurisdiction entertain a challenge made orally at any stage of the proceedings and may refuse to proceed further with the proceedings if the Court can come to a conclusion on sufficient or admitted evidence that there is no action properly before it. But the essential question in this case was whether there was sufficient or admitted evidence before the High Court when the learned Judge upheld the respondent Counsel's preliminary objection made orally and ordered the appellant's action to be struck off with costs. A perusal of the notes of evidence shows that at the hearing before the learned Judge on 4 October 1990, Counsel for the respondents merely stated from the Bar that they had written to the appellant's solicitors on 26 September 1990, and 30 October 1990, but there was no evidence produced of those letters to the Court.

Although the learned Judge referred to the above-quoted passage in the judgment of Slesser LJ in *John Shaw & Sons (Salford) Ltd v. Peter Shaw & John Shaw (supra)* which, we agreed with Mr. Abraham, supported the appellant's contention that a substantive motion is required, it would appear that the learned Judge had overlooked the following passages in the judgments of Greer LJ and Roche LJ respectively in the same case (1):

> In *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse*, the Court held that the evidence established that the English representative of the Russian corporation had authority to bring the action, but Lords Cave and Atkinson and Atkin LJ went beyond what was necessary to decide the case and expressed the opinion that the point of want of authority could not be raised by way of defence, but ought to be raised by notice of motion to stay or dismiss the action. These observations do not, in my judgment, mean that if the facts actually put in evidence prove that the solicitors commenced the proceedings without any authority from the named plaintiff, the Court ought to ignore those facts, and give judgment in favour of or against a party who *ex hypothesi* is not present in Court. In my opinion the Court has inherent jurisdiction to say "as it is clearly established that the action has been brought by solicitors who were not authorized by the named plaintiff to bring it, we will strike it out". (Greer LJ)

and:

> As to the preliminary question whether the plaintiff company was properly before the Court, that is to say, whether the action was instituted and carried on with its authority, I have arrived at the same result as Greer LJ, but for different reasons, which I propose briefly to state.
>
> I agree with both the Lords Justices as to the result of the decided cases and particularly of the *Daimler case* and of the *Russian Commercial Bank* case. The principles to be derived from them are that such an objection to a right to sue as is here taken should be taken not at the trial but by an interlocutory motion or summons; that if such procedure is not adopted the Court need not, and ordinarily should not, entertain such an objection at the trial as if it were a defence. If it were otherwise, then for reasons pointed out by Warrington J, in *Richmond v. Branson*, the position of the Court would be well nigh intolerable. Nevertheless, as appears from the decision in the *Daimler* case, if want of capacity or authority to sue plainly appears at any stage the Court may then strike out the action.

We would also note and point out that the case of *Russian Commercial and Industrial Bank v. Comptoir D'escompte De Mulhouse* [1925] AC 112 went up to the House of Lords which held *inter alia* that it was not open to the defence in that case to raise by way of defence to the action the objection that the London branch manager of the plaintiff bank had no authority to bring the action in the name of the plaintiff bank, but that they ought to have moved to strike out the name of the bank as plaintiff. The House of Lords approved *Richmond v. Branson & Son* [1914] 1 Ch. 968, 974 in that case.

Although the various *dicta* in the authorities as to the methods open to a defendant to contest the authority to bring an action are not altogether easy to reconcile or understand, we would agree that a challenge to authority of solicitors may be made at any time and the Court in its inherent jurisdiction may entertain the challenge made orally and may order the action to be struck off if there was sufficient or admitted evidence that there is no action properly before it. But when there is no such evidence, the Court should only stay the proceedings and determine the issue of want of authority on the application of a party by motion or summons.

In the circumstances of this case, we therefore stayed the appeal and remitted the case to the High Court for the trial Judge to hear and consider the challenge of the appellant solicitor's authority on a substantive application. We also ordered that the costs before us be costs in the cause.

Also found at [1991] 2 CLJ 1309